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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL JOSEPH SMITH,

Defendant and Appellant.

B208967

(Los Angeles County  
Super. Ct. No. LA057363)

APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene E. Schempp, Judge. Affirmed.

Law Office of Margaret E. Dunk and Margaret E. Dunk, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted defendant and appellant Daniel Joseph Smith (defendant) of one count of second degree robbery (Pen. Code, § 211)<sup>1</sup> (count 1) and one count of attempted second degree robbery (§§ 664/211) (count 2). The jury acquitted defendant of a third charge of second degree robbery (count 3). The jury found true the special allegation with respect to count 1 that defendant personally used a firearm (§ 12022.53, subd. (b)) and the special allegation with respect to count 2 that defendant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). The trial court sentenced defendant to a total of 13 years in state prison.

Appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) requesting that this court review independently the entire appellate record.<sup>2</sup> We have done so and determined that no arguable issue exists on appeal. We therefore affirm the judgment.

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<sup>1</sup>

All statutory references are to the Penal Code unless stated otherwise.

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Defense counsel concurrently filed a motion to augment the record. We grant the motion with respect to defendant's motion for the appointment of an expert on cross-racial identification. (Cal. Rules Ct., rules 8.155(a)(1)(A), 8.320(b)(13)(A); 8.340.) We deny the motion with respect to the minute orders relating to the revocation of defendant's probation in Superior Court Case No. BA 326575 because defendant's notice of appeal relates only to the judgment in this case.

## BACKGROUND

### A. The Prosecution Case<sup>3</sup>

Shortly after 6:00 p.m. on November 14, 2007, Esau Ayala was walking westbound on Sherman Way near Tampa Avenue. Two young men on a single bicycle approached him. One of the men was seated and pedaling, while the other man stood behind holding the first man's shoulders. Mr. Ayala identified defendant as the man who was standing. Defendant got off the bike and pointed a knife at Mr. Ayala's abdomen from approximately three feet away. Defendant demanded that Mr. Ayala surrender his wallet. Mr. Ayala fled and managed to escape. He immediately called 911 to report the crime to police. A few days later, Mr. Ayala identified defendant from a photo lineup as the person with the knife who asked for his wallet.

At approximately 9:00 p.m. on November 15, 2007, Ricardo Jimenez was walking home from work on Vanowen Street near Corbin Avenue, a few blocks from where Mr. Ayala had been robbed the night before. He was speaking on his cell phone, which had a picture of his two daughters on the screen. Two young men on bicycles approached him from behind and passed him. One of the young men circled back and stopped approximately five feet in front of Mr. Jimenez. Mr. Jimenez identified defendant as that man. Defendant pulled out a small gun and pointed it at Mr. Jimenez. Defendant demanded that Mr. Jimenez surrender his cell phone and wallet. Mr. Jimenez complied. Defendant removed just over \$100 in cash, including five \$20 bills, from Mr. Jimenez's wallet and returned the wallet to Mr. Jimenez. Defendant and his companion then left.

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<sup>3</sup> Jose Repreza, the alleged victim in count 3, testified that he was robbed at gunpoint by two young men on a bicycle, but that defendant was not one of them. Defendant was acquitted on count 3. We therefore omit a detailed statement of the evidence relevant to that count.

Mr. Jimenez flagged down a passing motorist who assisted Mr. Jimenez in attempting to find defendant and his companion. They were unsuccessful. Mr. Jimenez called the police and reported the crime.

Los Angeles Police Department Officer Andre Abrams and his partner responded to Mr. Jimenez's call. The officers broadcast descriptions of the suspects given by Mr. Jimenez.

Officer Francisco Maravilla and his partner, Officer Jensen, received the crime broadcast. The officers observed two men who matched the suspects' descriptions with bicycles in front of a liquor store a few blocks from the crime scene. Officer Maravilla saw one of the suspects, later identified as defendant, duck down between two cars as the officers' marked patrol car passed. Although he initially thought the action suspicious, Officer Maravilla testified that he believed that defendant was merely picking up a bicycle off the ground.

By the time the officers made a U-turn to go back to the liquor store, defendant and his companion were gone. The officers searched for them on foot. The officers found defendant leaving a Chevron minimart. The officers detained defendant and conducted a pat-down search. They recovered a cell phone and some cash. No weapon or ammunition was recovered. Defendant claimed that the cell phone belonged to his friend. He spontaneously told the officers that he had heard about some robberies, but he knew nothing about them.

Officer Abrams and his partner picked up Mr. Jimenez and transported him to where defendant was detained. They gave Mr. Jimenez a standard field show-up admonition. Mr. Jimenez identified defendant as the person who had pointed the gun at him. Mr. Jimenez also identified the cell phone recovered from defendant as his phone, as it had a picture of his two daughters on the screen.

Police later searched the motel room where defendant said he resided. They recovered no weapons or other contraband.

## **B. The Defense Case**

Defendant testified on his own behalf. He testified that he had stayed with his cousin, Conrad Spriggs, the night of November 14, 2007—the night Mr. Ayala was robbed—and that he went to a funeral the next day. After the funeral, he met his friend Robert and they rode bikes on Sherman Way.

While they were riding, defendant picked up a broken screwdriver. Defendant had no money and he wanted to buy cigarettes and drinks, so he robbed Mr. Jimenez, using the broken screwdriver as a weapon. He ditched the screwdriver under a trash can at the gas station where he was detained. Defendant denied having a gun that evening. He had lied to the police about not robbing Mr. Jimenez. He denied robbing Mr. Ayala, and testified that he had never seen Mr. Ayala before.

Conrad Spriggs testified that defendant was his second or third cousin. Defendant arrived at Mr. Spriggs's house at around 6:00 p.m. on November 14, 2007 and stayed all night. Defendant left at around 9:00 a.m. the next day.

## **C. Procedural Background**

Defendant was charged in a three count information with the second degree robbery of Mr. Jimenez (count 1); the attempted second degree robbery of Mr. Ayala (count 2); and the second degree robbery of Jose Repreza (count 3). The jury acquitted defendant on count 3, but convicted him on counts 1 and 2. The jury found true the special allegations that defendant personally had used a handgun when robbing Mr. Jimenez and a knife when robbing Mr. Ayala.

The trial court sentenced defendant to the low term of two years on count 1 because of his age and “minimal” criminal record, plus a ten-year term for the firearm enhancement, for a total of 12 years. The trial court imposed a consecutive sentence of one year on count 2, consisting of eight months (one-third of the middle term) for the attempted robbery and four months (one-third of one year) on the weapons enhancement. The trial court gave defendant presentence custody credit for 250 days, consisting of 218 days of actual custody and 32 days of conduct credit. The trial court imposed a \$500

restitution fine (§ 1202.4, subd. (b)); a \$500 parole revocation restitution fine, stayed (§ 1202.45); two \$20 court security fees, for a total of \$40 (§ 1465.8, subd. (a)(1)); and \$115 in direct victim restitution to compensate Mr. Jimenez (§ 1202.4, subd. (f)). Defendant timely appealed.

## DISCUSSION

We appointed counsel to represent defendant on this appeal.<sup>4</sup> After examining the record, appointed counsel filed an opening brief raising no issues, but requesting this court to review the record independently in accordance with *Wende, supra*, 25 Cal.3d 436. We gave notice to defendant that his appointed counsel had not found any arguable issues, and that defendant had 30 days within which to submit by brief or letter any grounds of appeal, contentions, or arguments he wanted this court to consider. We received a one-page letter brief from defendant that states defendant's belief that there was insufficient evidence to support his convictions and the jury's true findings on the enhancement allegations.<sup>5</sup> We have conducted an independent review of the record.

Defendant's challenge to the sufficiency of the evidence has no arguable support in the record. "In reviewing a criminal conviction challenged as lacking evidentiary support, 'the court must review the whole record in the light most favorable to the

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On November 19, 2008, we received a letter from defendant requesting the appointment of new appellate counsel to "file a motion for the gun enhancement." We denied defendant's request for new counsel and ordered that his "petition for modification of sentence is deemed to be a habeas corpus petition." Our review of the record on appeal reveals no arguable ground for habeas corpus relief. We therefore deny defendant's petition.

On December 26, 2008, we received another letter from defendant requesting new appellate counsel. We again deny defendant's request.

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Defendant's letter brief also mentioned false evidence and erroneous rulings on hearsay objections, but defendant did not specify to what evidence or which rulings he referred. Our review of the record has unearthed no arguable issues with respect to either.

judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.) We “presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Defendant admitted that he robbed Mr. Jimenez. With respect to the firearm enhancement, Mr. Jimenez testified that defendant was within five feet of him when defendant took a gun from his pocket or waistband and pointed it at him. With the gun still in his hand, defendant moved even closer to Mr. Jimenez to take his cell phone and wallet, which Mr. Jimenez handed to defendant. Mr. Jimenez described the gun as a semi-automatic handgun with a barrel four to five inches long. It was black with silver parts. Mr. Jimenez’s testimony was inarguably sufficient to sustain the jury’s true finding on the firearm enhancement.

Although defendant denied that he robbed Mr. Ayala, Mr. Ayala identified defendant as the person who robbed him from a photo lineup only days after the crime, and identified defendant as the robber again in open court. With respect to the weapon enhancement, Mr. Ayala testified that defendant pointed a knife at him from only three feet away. Defendant held the knife with the blade pointed toward Mr. Ayala’s abdomen. Mr. Ayala described the knife as being approximately eight inches long, including the handle. Mr. Ayala’s testimony was inarguably sufficient to sustain both defendant’s conviction and the jury’s true finding on the weapon enhancement.

We have examined the entire record and determined that there are no arguable issues on appeal. We are therefore satisfied that defendant’s appellate counsel has fully complied with her responsibilities. (*Wende, supra*, 25 Cal.3d at p. 441.)

**DISPOSITION**

The judgment is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.